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No. 09-553

IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et. al.*,
Appellants,
v.
MARCIANO *PLATA* AND RALPH *COLEMAN*, *et. al.*,
Appellees.

Appeal from the United States District Courts
For the Eastern District of California and
The Northern District of California

JOINT MOTION TO DISMISS OR AFFIRM APPEAL OF DEFENDANT-INTERVENORS

Michael Bien
Jane E. Kahn
Ernest Galvan
Amy Whelan
Lisa Ells
ROSEN, BIEN & GALVAN, LLP
315 Montgomery St., 10th Fl.
San Francisco, CA 94104
Counsel for Coleman Appellees

Donald Specter
Counsel of Record
Steve Fama
Alison Hardy
Sara Norman
Rebekah Evenson
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, CA 94710
(510) 280-2621
Counsel for Coleman and Plata Appellees

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QUESTIONS PRESENTED

1. Whether the court below clearly erred when it found, pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(3)(E)(i) (1996), that prison "crowding is the primary cause of the violation of a Federal right," and that "no other relief," other than a reduction in prison crowding, would remedy the violations.

2. Whether, after finding that prison overcrowding is the primary cause of the constitutional violations, and that reducing crowding is a prerequisite to remedying the violations, the court below clearly erred by ordering the State to develop a plan to reduce the prison population.

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Pursuant to Rule 18.6, appellees move to dismiss the appeal or affirm the order below on the ground that the appeal is premature and the questions raised are so insubstantial as not to need further argument.

The essential facts at issue in this case – like those raised in the State's appeal from the same underlying order (Case No. 09-416 (Jurisdiction Statement filed Oct. 5, 2009)) – are undisputed. There is no serious dispute that California prisons fail to provide even minimally adequate health care – there are too few clinical facilities to screen and treat the vast number of prisoners who need care, too few medical and mental health beds to house prisoners in crisis, too few primary care doctors and mental health professionals to treat ill prisoners, too few medical or mental health specialists to meet the needs of the overwhelming number of prisoners who need such care, too few custody officers to escort prisoners to medical or mental health visits, completely overwhelmed medication delivery systems and record keeping systems, and textbook breeding grounds for outbreaks of infectious diseases and for mentally ill prisoners to decompensate. State App. 141a-142a. Despite the escalating need for care, there are so many prisoners that the prison staff is simply unable to identify medical emergencies, much less respond appropriately. State App. 104a-112a. As a result, the three-judge court found that the serious medical and mental health needs of prisoners are unmet or are mistreated, and prisoners are becoming sick and dying at an alarming rate. State App. 141a-142a. Neither defendant-intervenors (referred to herein as "intervenors") nor the State appellants claim that any of these findings are error.

To the contrary, Governor Arnold Schwarzenegger declared a State of Emergency because the severe prison crowding "has caused substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them" making prisons places of "extreme peril to the safety of persons." App. 2a, 14a. He declared that overcrowding causes "increased, substantial risk for transmission of infectious illness;" that "thousands of gallons of sewage spills and environmental contamination" result from overloading the prisons' sewage and wastewater systems; that crowding causes serious security risks; and that the suicide rate in the 29 most crowded prisons "[was] approaching an average of one per week." App. 2a, 3a, 10a. The Governor underscored that "immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding." App. 12a.

In the words of one of intervenors' experts, "the necessary constitutional medical and mental health services can't be provided with today's overcrowding." Trial Tr. 2202:4-6.

Nonetheless, the three-judge court did not order the State to reduce its prison population immediately. Instead, it issued an order requiring the State to submit a plan to reduce its prison population gradually. The State has submitted such a plan, (11/12/09 State Plan (*Plata* Docket 2274-1)), and all parties – including intervenors – now have an opportunity to comment on such plan. *See* 11/18/09 Order Inviting Responses (*Plata* Docket 2275).

The overwhelming evidence from plaintiffs' experts, the State defendants and their experts, and

intervenors and their experts, is that the measures by which the State proposes to reduce the prison population will not adversely impact public safety, and may improve public safety. *See, e.g.*, Trial Tr. 1995:8-20 (State's public safety expert); Trial Tr. 33044:7-9, 3045:5-12 (Law Enforcement Intervenors' closing argument); Trial Tr. 3022:24-3023:11 (District Attorney Intervenors' closing argument); Trial Tr. 3063:10-24 (San Mateo County Intervenors' closing argument); Trial Tr. 1007:21-1008:4 (Intervenor San Diego County Deputy District Attorney); Trial Tr. 1052:4-13 (Intervenor Stanislaus County Chief Probation Officer); Powers Report § III (same); Trial Tr. 2771:4-10 (Intervenor Yolo County Chief Probation Officer); Bennett Report ¶¶ 56-79 (Intervenor Sonoma County corrections expert); Bennett Supp. Report at 5-6 (same); Dumanis Trial Decl. ¶¶ 16-20 (*Plata* Docket 1711) (Intervenor San Diego District Attorney); Dalton Trial Decl. ¶¶ 17-25 (*Plata* Docket 1745) (Intervenor Los Angeles County Sheriffs' Department, Director of Bureau of Operations for Bureau of Offender Programs and Services); Buddress Trial Decl. ¶ 3 ((*Plata* Docket 1698) (Intervenor San Mateo County Chief Probation Officer); Trial Tr. 2012:20-25 (former Secretary of Corrections in Pennsylvania, Washington state and Maine); Trial Tr. 2106:8-2107:14 (member of State's "expert panel" on prisons); Krisberg Report at 4-12; Austin 8/15/08 Report, Austin 8/27/08 Report, and Austin 9/25/08 Report (member of State's "expert panel" on prisons).

Notwithstanding the wealth of uncontested evidence supporting the three-judge court's findings, intervenors' appeal raises purely factual disputes with the findings. Intervenors do not raise a single

question of law, and do not identify any splits of authority between the circuits. This Court should find that it lacks jurisdiction over the matter because the appeal is premature. In the alternative, if the Court notes probable jurisdiction, it is patent that the issues on appeal are not substantial questions requiring this Court's plenary review, and the decision below should be summarily affirmed.

JURISDICTION

Intervenors, like the State appellants in Case No. 09-416, invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1253 only by misstating the nature and import of the August 4, 2009 order on appeal.

Intervenors variously call the August 4 order on appeal a "prisoner release order" or a "mass release order." Intervenors' Jurisdictional Statement ("Int. J.S.") 5. In actuality, the August 4 order requires nothing more than that the State develop a plan, in consultation with all parties, that will gradually reduce its prison population. State App. 255a-256a. The court specifically stated that in developing its plan, the State "would not be required to throw open the doors of its prisons, but could instead choose among many different options or combinations of options for reducing the prison population." State App. 173a-174a. And indeed, on November 12, 2009, the State submitted a plan that would reduce the prison population using methods such as providing good time credits to prisoners to slightly shorten length of stay in prison; diverting low-level, low-risk offenders and parole violators who clog crowded prison reception centers (*see, e.g., Johnson v. California*, 543 U.S. 499, 502-503 (2005)) but spend very short periods of time in prison; increasing

county-level rehabilitative programming to reduce the number of offenders coming to prison in the first place; and building new prison facilities or transferring some California prisoners to out-of-state or federal custody. *See* 11/12/09 State Plan (*Plata* Docket 2274-1).

All parties, including intervenors, now have an opportunity to comment on the State's population reduction plan, 11/18/09 Order Inviting Responses (*Plata* Docket 2275), and the three-judge court may hold further proceedings to determine the appropriate scope of any final order requiring a reduction in the prison population. State App. 256a.

For the reasons discussed in appellees' Motion to Dismiss or Affirm in Case No. 09-416 (at 7-9), this Court lacks jurisdiction over this premature appeal, and prudential concerns counsel against noting probable jurisdiction or granting plenary review.

If this Court declines to note probable jurisdiction or grant plenary review now, intervenors and the State will have another opportunity to appeal once the three-judge court issues its final order. Appellees will support expedited briefing on any such appeal.

STATEMENT OF THE CASE

A statement of the facts and procedural history of the case on appeal is set forth in appellees' Joint Motion to Dismiss or Affirm in Case No. 09-416, at 1-7.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Intervenors' appeal solely disputes the three-judge court's findings of fact and does not present substantial questions requiring this Court's plenary review. If the Court does not dismiss the appeal for want of jurisdiction, the Court should summarily affirm the August 4 order.

I. The Three-Judge Court Did Not Clearly Err When It Found That Crowding Is The "Primary Cause" Of The Constitutional Violations And That "No Other Relief" Would Remedy the Violations.

Intervenors' arguments with respect to "primary cause" and "no other relief" are based on the false premise that the three-judge court excluded and refused to consider relevant evidence. Int. J.S. 8-9. Neither allegation finds any support in the record.

A. The Three-Judge Court's Decision Was Based On Evidence About Current And Ongoing Prison Conditions.

1. Intervenors contend that the three-judge court "simply assumed that constitutional violations identified years prior to issuance of the Prisoner Release Order continued unabated, and refused to permit evidence at trial to the contrary." Int. J.S. 5. The opposite is true; voluminous evidence of current conditions was admitted and considered. Intervenors, like the State, fail to identify a *single item of evidence that was offered but excluded.*

Intervenors' argument rests on the three-judge court's correct holding that it had no authority to

decide the underlying question regarding constitutionality, and so would not hear evidence *solely* relevant to that question. Int. J.S. 5.[1] But it is undisputed that the parties introduced and the court analyzed voluminous evidence about conditions in the prisons as of August 31, 2008 – six weeks before trial – which was relevant to plaintiffs' contention that overcrowding is the primary cause of the violations and that no other relief will remedy the violations.

Intervenors argue that they and the State were prevented from providing "evidence regarding massive increases in spending and the allocation of resources," which, according to intervenors, resulted "in substantial overall improvements in care." Int. J.S. 9.[2] In fact, key State officials in charge of

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[1] Intervenors do not take issue with the three-judge court's conclusion that it had no authority to make a determination whether the underlying conditions are constitutional. State App. 77a-78a. Under the PLRA, the proceedings in the three-judge court were solely about whether to enter a prisoner release order to remedy the ongoing constitutional violations that the single judge courts had found to exist. 18 U.S.C. § 3626(a)(3)(E). The questions whether there is a constitutional violation in the first place, whether there is still an ongoing constitutional violation after the passage of time, and whether prospective relief should be maintained or terminated, are questions reserved to the single judge district courts. 18 U.S.C. § 3626(a), (b), (c).

[2] Intervenors' claim that they would have introduced current evidence but for the three-judge court's ruling defies the record. In fact, intervenors admitted before trial that "Counsel for all Defendant Intervenors have conferred and believe that they will have a very limited role" in the proceedings relating to whether crowding is the primary cause of the constitutional

(continued)

prisons and prison medical and mental health care presented exhaustive testimony about the increases in health care expenditures and about the current conditions in the prisons, including the current level of crowding, current health care statistics, current medical and mental health care staffing levels, current medication management problems, and current data about suicides and other deaths. *See, e.g.*, Exhs. D-1000 - D-1002, D-1004 - D-1008, D-1233, D-1149, D-1259-1, D-1235-2, Trial Tr. 1272:12-21, 836-944, 1891-1940, 1668-1709, 1734-1772, 755-823, 724-754, Brewer Dep. 135:5-138:5.

Furthermore, the State's medical and mental health experts toured the prisons multiple times, including only weeks before trial; viewed the medical facilities; interviewed medical personnel and other prison staff, as well as prisoners; and reported and testified about the conditions they found. *See* Exhs. D-1016, D-1017, D-1019, State App. 82a, D-1020; Trial Tr. 1071-1143, 1191-1253.[3]

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violations. 11/13/08 Def.-Intervenors' Joint Opposition to Mot. for Reconsideration at 6 (*Plata* Docket 1792). That would have been the appropriate time to introduce evidence about current conditions, but the only witness intervenors presented on this question was a single State legislator with no personal knowledge of current conditions. *See* Runner Trial Decl. (*Plata* Docket 1658).

[3] Plaintiffs' medical and mental health experts, too, toured the prisons in the weeks prior to trial, and provided exhaustive testimony about current deficiencies in the medical and mental health care systems. Stewart Supp. Report; Haney 8/15/08 Report; Shansky 2nd Supp. Report.

The State also introduced into the record reports of the neutral court-appointed Receiver and Special Master, which include extensive discussion of current conditions in the prisons. *See, e.g.*, Exhs. D-1087 - D-1100, State App. 150a, D-1106, D-1224-1231, D-1110 - D-1112, D-1292, State App. 41a, D-1293, D-1294, D-1108, State App. 49a.

Moreover, numerous correctional officers from around the State testified about conditions they recently observed in the prisons. *See, e.g.*, Trial Tr. 509:18-510:6, 519:2-12 (too many prisoners with medical needs for the amount of health care space and health care staff at prison); Trial Tr. 575:10-577:5 (dangerously inadequate housing for suicidal prisoners); Trial Tr. 601:1-13 ("way too many inmates" for treatment space at prison); Trial Tr. 664:6-16 (describing treatment room that is shared simultaneously by the scheduling secretary and practitioners doing exams, including eye exams in the dark and hemorrhoid exams); Trial Tr. 663:22-664:5 (describing how patient intakes are done in hallways); Trial Tr. 661:19-662:1, 665:12-666:3, 671:21-25 (not enough staff to monitor provision of insulin and narcotics, or to double-check medication distribution); Trial Tr. 662:24-663:8; 668:15-23 (staff are overwhelmed by the number of patients and simply do not have the time or the resources to distribute medications properly; serious mistakes occur); Trial Tr. 691:2-4, 693:15-21 (prison too crowded to effectively monitor for medical conditions, especially in buildings with triple bunks).

Thus, far from being "stale" (Int. J.S. 9), the evidence on which the three-judge court based its decision was fully current and comprehensive.

2. Intervenors claim that the "the current nature of any constitutional violations should have affected the three-judge court's determination as to the scope of the order . . ." Int. J.S. 9. That is precisely what occurred.[4] The court's determination was firmly grounded in the current conditions. *See, e.g.*, State App. 86a-92a (August 4 order describes currently crowded conditions at prison reception centers, and how that crowding currently prevents provision of adequate health care), 97a-100a (describing current shortage of beds for mentally ill prisoners, and the impact of such shortage on provision of mental health care), 113a-114a (describing current inadequacies in medical management systems within prisons, and the resulting increased acuity of illness), 92a-95a (describing current severe shortage of treatment space in prisons, and how that shortage results in inadequate health care), 101a-102a (describing how current crowded conditions increase risk of spread of infectious diseases), 103a (describing how current crowded conditions are "toxic" to mentally ill prisoners), 105a-112a (describing current shortages

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[4] Intervenors claim that the three-judge court's analysis focused on "'whether . . . requiring a reduction in the population of California's prisons was necessary to remedy the previously identified constitutional violations[.]'" Int. J.S. 8 (quoting State App. 77a). In fact that quote from the August 4 order is a description of the analysis conducted by the *single judge courts* in determining the necessity for convening a three-judge court. State App. 77a. The three judge court's analysis focused on the evidence presented at trial – including the defendants' own expert testimony – demonstrating that crowding is the primary cause of the current deficiencies in health care, and must be reduced if the violations are to be remedied.

in medical, mental health and custodial staff, and the impact of such shortages on health care), 116a-118a (describing current problems with lockdowns preventing access to care), 121a-123a (current evidence regarding crowding causing increasing acuity of mental illness).

Only after canvassing the evidence regarding ongoing violations in the prisons did the three-judge court find that crowding is the primary cause of the violations, and that no other relief will provide a remedy. "The crushing inmate population has strained already severely limited space resources to the breaking point, and crowding is causing an increasing demand for medical and mental health care services, a demand with which defendants are simply unable to keep pace." State App. 140a; 141a-142a.

Neither the State nor intervenors contest this factual finding, or any of the subsidiary findings upon which it is based.

Having failed to identify a *single* item of evidence that was offered but excluded, and having failed to acknowledge the plethora of evidence about current conditions or the three-judge court's well-supported findings with respect to that evidence, intervenors' claim that the three-judge court improperly excluded evidence about current conditions must be rejected.

B. The Three-Judge Court Properly Considered Reports Of The Plata Receiver, The Coleman Special Master, And The Experts

Intervenors next claim that the court "ignored" evidence from the court-appointed Receiver and

Special Master showing that a prisoner release order was not necessary. Int. J.S. 9. To the contrary, the court carefully considered all of the reports of the Receiver and Special Master in reaching its conclusion. *See, e.g.*, State App. 155a-159a.

Intervenors quote out-of-context excerpts from an out-of-court talk given by the Receiver, and from that scant evidence argue that the Receiver admitted that California "*could* provide constitutional levels of care regardless of population." Int. J.S. 9-10 (emphasis added). Taken in context, the Receiver's comment plainly refers only to the Receivership's improved ability to employ medical professionals (in non-rural prisons) because the Receivership is able to pay full market rates for their services. Spitzer Decl., Exh. D at minutes 28:19-31:29. In the very next breath, however, the Receiver identifies serious problems created by overcrowding "because frankly everything in the prisons is made more difficult by overcrowding . . . . I have absolutely no doubt that the conditions of overcrowding, by itself, contributes to greater morbidity." *Id.*

More importantly, and entirely omitted from intervenors' brief, is that the Receiver has submitted numerous thoughtful, detailed reports to the court, all of which demonstrate that crowding must be resolved if the Receiver's efforts are to provide any timely remedy for the ongoing violations.

On May 15, 2007 the Receiver filed with the court a report describing why overcrowding has "especially adverse consequences concerning the delivery of medical, mental health and dental care." Exh. P-26 at 1, State App. 26a. He proclaimed that "failure is not an option" and that his remedial efforts

would remedy the violations "over time," but he also made it clear that overcrowding will significantly delay a long overdue remedy, and cause serious injury through the spread of infectious and communicable diseases. *Id.* at 30, 41-42.

One month later, in June 2007, the Receiver filed with the court a supplemental report identifying changes that the CDCR made in the intervening weeks which clearly demonstrated that overcrowding-related problems "are now assuming a size, scope and frequency that will clearly extend the timeframes and costs of the receivership and may render adequate medical care impossible, especially for patients who require longer term chronic care." Exh. P-27 at 10; *See also* Exh. P-55 at 1 (Receiver states "[i]t will not be possible to raise access to, and quality of, medical care to constitutional levels with overpopulation at its current levels."), 11/3/08 Order at 12 (*Plata* Docket 1757) (granting judicial notice).

The Receiver's reports to the court in the following years have demonstrated that crowding is indeed causing deficiencies in care, and that "adequate care cannot be provided for the current number of inmates at existing prisons." State App. 155a-156a (citing Exh. D-1133 at 27-28 (Receiver's June 6, 2008 Turnaround Plan of Action), State App. 93a. For example:

- The Receiver's January 15, 2009 Tenth Tri-Annual Report states that overcrowding-related crises significantly slow Receiver's work. *Plata* Docket 2011-2 at 3, 110-111. "Instead of working to save lives and implementing cost cutting initiatives, the Receiver has been forced to utilize

his limited resources to 'put out fires' created by the State." *Id.* at 3.

- The Receiver's Sept. 15, 2008 Ninth Quarterly Report states: "The progress which has been made to date will be for naught unless we are able to make permanent improvements to CDCR's facilities. Right now, the facilities are simply inadequate, given CDCR's population, to sustain for the long-term the improvements we are seeing." Exh. D-1100 at 80, State App. 150a.

- The Receiver's Ninth Quarterly Report also notes that medical care problems at an out-of-state prison housing California prisoners "had a serious negative impact on the Office of the Receiver, drawing clinical personnel away [from] other important projects and delaying 'in-state' remedial efforts. In essence ... valuable clinical hours have been devoted to helping a private prison ... rework its medical delivery system ... in order to keep the out of state transfer process from collapsing." *Id.* at 49.

- The Receiver's June 16, 2008 Eighth Quarterly Report states that the healthcare system will remain inadequate and "prisoners will continue to die unnecessarily" so long as there continues to be a mismatch between the number of prisoners and the prison healthcare facilities. Exh. D-1099 at 46.

Thus, the three-judge court correctly found that "[a]lthough the CDCR and the Receiver have implemented a number of remedial programs as a result of the *Plata* and *Coleman* litigation, and defendants have sought in various ways to improve the medical and mental health care provided in

California's prisons, these efforts cannot succeed in the absence of a prisoner release order." State App. 145a. Intervenors do not claim that this finding was error.

Intervenors argue that the court "ignored" a statement by the *Coleman* Special Master that reducing the prison population would not, by itself, immediately remedy the violations. Int. J.S. 9-10. Far from ignoring it, the court quoted the very same Special Master report. State App. 157a-158a.[5] The court correctly found that while reducing the prison population "is not by itself a panacea," and the State will still need to provide "professionally sound" care, administer medications, etc. (steps as to which the Special Master can be of "significant assistance"), "the defendants cannot remedy the ongoing constitutional violations without significant relief from the overcrowded conditions." State App. 158a. Intervenors do not contest this finding.

Finally, intervenors claim that plaintiffs' expert Dr. Shansky testified that "California could provide constitutionally adequate care for more than 172,000

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[5] That the Special Master stated that crowding relief will not by itself resolve the constitutional deficiencies does not amount to an admission that "a prisoner release order was not necessary." Int. J.S. 9. To the contrary, it is an acknowledgement that an order will not be sufficient. Moreover, the *Coleman* Special Master has long acknowledged the catastrophic effects of overcrowding on the mental health care delivery system, and the need to reduce crowding. *See, e.g.*, Exh. P-35 at 16-17 ("Over the past 11-plus years, much has been achieved, and many of the achievements have succumbed to the inexorably rising tide of population, leaving behind growing frustration and despair"), State App. 41a.

inmates if other reforms were implemented." Int. J.S. 10 (citing Trial Tr. 491:19-492:08). In fact, while Dr. Shansky agreed to the hypothetical that the Receiver could "eventually" remedy the violations (Trial Tr. 492:1-4), he affirmed that it is not "foreseeable when that could be achieved absent a prisoner release order or a population cap of some sort." Trial Tr. 492:21-25. In Dr. Shansky's opinion, "crowding is the primary cause of the ongoing inadequate medical care in the CDCR system. Overcrowding is the one factor that negatively impacts almost every other matter that must be addressed to create a minimally adequate medical care delivery system for California's prisons." Shansky 2d Supp. Report ¶9; State App. 134a. Dr. Shansky also testified that overcrowding in the prisons significantly interferes with and detracts from efforts to improve medical care. Shansky 3d Supp. Report ¶ 3; Shansky Report ¶ 138 (unless overcrowding addressed, CDCR locked into "crisis response" approach where it can focus only on putting out "fires").

As the court correctly found, "'[r]educing the population in the system to a manageable level is the only way to create an environment in which other reform efforts, including strengthening medical management, hiring additional medical and custody staffing, and improving medical records and tracking systems, can take root in the foreseeable future.'" State App. 168a (quoting Dr. Shansky). Intervenors do not contest this finding.

C. The Three-Judge Court's Findings With Respect To "No Other Relief" Are Correct And Uncontested.

Intervenors' final contention with respect to the need for a prisoner release order is that the three-judge court did not adequately consider alternative remedies. On this point, too, the assertion is belied by the record.

The three-judge court did not hold, as intervenors assert, that "no alternative to a prisoner release order *existed*," Int. J.S. 10-11; it held that no relief other than a prisoner release order would *remedy the violations*. State App. 168a. It reached that conclusion only after exhaustively canvassing every alternative proposed by the State and intervenors. State App. 145a-168a.

Intervenors contend that the three-judge court "rejected a number of viable alternatives to a prisoner release order," Int. J.S. 11 n.9, but they name only two alternatives they consider "viable"–transferring prisoners out of state, and transferring inmates to federal custody. *Id.* As the court noted, transferring inmates out of state, "if ordered by the court, would fall within the PLRA's definition of a prisoner release order, because it 'directs the release [of inmates] from . . . *a* prison.'" State App. 159a n.58 (quoting 18 U.S.C. § 3626(g)(4)). The same is true for transfers to federal custody. Thus, transferring prisoners to other institutions is one means by which the State could reduce its prison population pursuant to a prisoner release order; it is not an *alternative* to a prisoner release order. Indeed, the State's population reduction plan

incorporates precisely these measures. State App. 325a-327a.

Intervenors do not identify any other alternatives that they contend should have been considered by the court, nor do they contest *any* of the three-judge court's findings rejecting the alternatives to a prisoner release order that were proposed by the State. State App. 145a-168a.

The three-judge court found that prison construction was not a viable alternative to a prisoner release order because the construction proposed by the State would take so long to complete that it could not hope to remedy the violations that every day threaten the lives and health of prisoners. State App. 145a-154a. No party claims that this was error.[6]

The three-judge court found that simply hiring more medical, mental health, and custodial staff is not a viable alternative because, despite extensive efforts over many years, there has been a "serious and ongoing difficulty in filling vacant positions," State App. 154a, "working conditions for such personnel in California's overcrowded prisons are uninviting, and many potential staff members are unwilling to work under them," *id.*, and "[e]ven if staff could be hired, they would have almost nowhere

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[6] In a separate proceeding, the State has contended that the courts have no power to order construction projects. *Plata v. Schwarzenegger*, No. 09-15864 (9th Cir.) (State's opening brief filed July 31, 2009, reply brief filed Sept. 10, 2009, oral argument held Sept. 16, 2009). Accordingly, the State cannot contend that construction is appropriate "relief" short of a prisoner release order that the court could have issued.

to work because CDCR's facilities lack the physical space required to provide medical and mental health care." State App. 154a-155a. No party claims that these finding were error.

The three-judge court further found that the *Plata* Receivership and *Coleman* Special Mastership, while necessary, will not be able to remedy the violations in the absence of a prisoner release order. State App. 156a-158a. "[A] reduction in the present crowding of the California prisons is necessary if the efforts of the *Plata* Receiver and the *Coleman* Special Master to bring the medical and mental health care in California's prisons into constitutional compliance are ever to succeed. In the absence of a prisoner release order, all other remedial efforts will inevitably fail." State App. 158a-159a.

Indeed, the former head of the California prison system affirmed that "without addressing the issue of overcrowding, the Department of Corrections will never be able to provide appropriate medical or mental healthcare and . . . sustain any kind of quality constitutionally-adequate medical or mental healthcare." Trial Tr. 385:6-10. Neither the State nor intervenors contest this, or cite any evidence to the contrary.

Overwhelming evidence supports the three-judge courts' findings with respect to "primary cause" and "no other relief," and intervenors' factual contentions regarding these matters fail to present a substantial question requiring this Court's review. The order below should be summarily affirmed.

II. The Order Below Provides The Least Intrusive Means To Remedy The Constitutional Violations, And Is Narrowly Tailored.

1. Intervenors' primary argument regarding remedy is that the three-judge court's August 4 order is not narrowly tailored because the court "refused to hear evidence" about current conditions. Int. J.S. 12. However, as already noted, intervenors fail to identify even a single item of evidence that the court "refused to hear," and in fact the court admitted copious evidence regarding current conditions. *Supra* at 6-9. The contention must fail.

2. Intervenors next argue that the "prisoner release order" is overbroad because non-class members may benefit from a population reduction order. Int. J.S. 12-13. Intervenors cite *Missouri v. Jenkins*, 515 U.S. 70, 98 (1995) for the general proposition that any relief must be aimed at eliminating constitutional violations. Int. J.S. 12. That is precisely the situation here: the overwhelming number of prisoners results in the violations; an order to reduce crowding is necessary to remedy the violations; hence, such an order is by definition narrowly tailored to that result. The three-judge court correctly found that a "systemwide remedy is appropriate" here because "the constitutional violations identified by the *Plata* and *Coleman* courts exist throughout the California prison system and are the result of systemic failures in the California prison system." State App. 171a; *see also Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 463-465 (1979); *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

Intervenors do not contest this finding, but appear to suggest that the only appropriate systemwide relief would be an order to release class members. But in accordance with this Court's mandates in *Bounds v. Smith*, 430 U.S. 817 (1977) and *Lewis*, 518 U.S. 343, the three-judge court did not require any specific remedy, but instead deferred to the State to propose a remedial plan in the first instance. State App. 172a-173a. The State made a reasonable policy choice to reduce the population by targeting low-risk prisoners, some of whom are class members and some of whom are not. 11/12/09 State Plan (*Plata* Docket 2274-1); State App. 343a. Consistent with *Bounds* and *Lewis*, the three-judge court may approve the State's plan, even if it incidentally benefits non-class members. *See, e.g., Davis v. Bd. of School Comm'rs of Mobile Cty.*, 402 U.S. 33, 37 (1971) (approving structural reforms that may impact class members and non-class members); *Columbus Bd. of Educ.*, 443 U.S. 449 (same).

Intervenors' suggestion that the court must eschew the State's proposed remedial plan and impose upon the State an order that reduces the prison population by other means finds no support in the law. In any event, intervenors' suggestion is premature because the court has not yet ruled on any objections to the State's plan.

3. Intervenors next argue that the August 4 order is not narrowly tailored because it is not "focus[ed] directly and exclusively on medical and mental health issues such as staffing ratios, equipment and facilities, and record keeping." Int. J.S. 13. It is unclear what intervenors intend by this argument, but it appears to be their contention that "other

relief" – such as orders to hire more staff, build more facilities, or improve record keeping – would remedy the violations, dressed up with a slightly different label. But the three-judge court considered and rejected such an argument, State App. 145a-168a, and intervenors do not contend that to be error.

Indeed, the *Plata* and *Coleman* courts have collectively issued scores of orders directed at the matters suggested by intervenors, and other specific medical and mental health care problems, to no avail. State App. 13a-69a. The reason that none of those orders have succeeded in remedying the problem is overcrowding.

The three judge court found that "'[t]he limitations on the CDCR, including staffing, administrative resources and especially treatment space, are so severe that the only avenue for building a constitutional health care delivery system is to reduce the demand on the system by lowering the number of patients its serves.'" State App. 164a (quoting Dr. Shansky). Even intervenors' expert agreed that "the necessary constitutional medical and mental health services can't be provided with today's overcrowding." Trial Tr. 2202:4-6. Thus, the court correctly found, "Other forms of relief [other than reducing the prison population] are either unrealistic or depend upon a reduction in prison overcrowding for their success." State App. 168a. Intervenors do not contest that conclusion.

Accordingly, since a reduction in the prison population is *necessary* to remedy the violations, it is certainly "narrowly tailored" to that result.

4. Finally, intervenors contend that the three-judge court provided insufficient justification for

setting the population cap at 137.5% of design capacity. Int. J.S. 14. That contention lacks merit, as explained in Plaintiffs' Motion to Dismiss or Affirm in the State's appeal, Case No. 09-416, at 25-27. Intervenors also claim that the three-judge court entered its order "without any provision for limiting continued population reduction in the event constitutional violations have been resolved at a higher population level." Int. J.S. 14. In fact, the three-judge court specifically retained jurisdiction "to consider any subsequent modifications [to the population reduction plan] made necessary by changed circumstances." State App. 256a. Under the PLRA, any injunctive relief, including a prisoner release order, may be modified or terminated if the constitutional violations are remedied. *See* 18 U.S.C. § 3626(b)(1), (4). Accordingly, the three-judge court's order will not be inflexibly applied in the absence of a constitutional violation.

III. Intervenors' Arguments Regarding Public Safety Are Misplaced.

The PLRA requires that courts considering granting any prospective relief in prison cases "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1)(A). Congress well understood that circumstances might exist where the law compels a court to issue a prisoner release order notwithstanding its adverse impact on public safety. "While prison caps must be the remedy of last resort, a court still retains the power to order this remedy despite its intrusive nature and harmful consequences to the public if, but only if, it is truly necessary to prevent an actual

violation of a prisoner's federal rights." H.R. Rep. No. 104-21, § 301, at 25 (1995).

Nonetheless, the three-judge court correctly found that the State can devise a safe plan that will reduce the prison population without adversely impacting public safety. State App. 185a-188a, 192a-193a.

Intervenors conceded in the proceedings below that measures exist by which the state can reduce the prison population without adversely impacting public safety. *See, e.g.*, Trial Tr. 3044:7-9, 3045:5-12 (Law Enforcement Intervenors' closing argument); Trial Tr. 3022:24-3023:11 (District Attorney Intervenors' closing argument); Trial Tr. 3063:10-24 (San Mateo County Intervenors' closing argument); Trial Tr. 1007:21-1008:4 (Intervenor San Diego County Deputy District Attorney); Trial Tr. 1052:4-13 (Intervenor Stanislaus County Chief Probation Officer); Powers Report § III (same); Trial Tr. 2771:4-10 (Intervenor Yolo County Chief Probation Officer); Bennett Report ¶¶ 56-79 (Intervenor Sonoma County corrections expert); Bennett Supp. Report at 5-6 (same); Dumanis Trial Decl. ¶¶ 16-20 (*Plata* Docket 1711) (Intervenor San Diego District Attorney); Dalton Trial Decl. ¶¶ 17-27 (*Plata* Docket 1745) (Intervenor Los Angeles County Sheriffs' Department, Director of Bureau of Operations for Bureau of Offender Programs and Services); Buddress Trial Decl. ¶ 3 (*Plata* Docket 1698) (Intervenor San Mateo County Chief Probation

Officer). The State's expert likewise agreed. Trial Tr. 1995:8-20 (defendants' public safety expert).[7]

The three-judge court found that "[t]here was overwhelming agreement among experts for plaintiffs, defendants, and defendant-intervenors that it is 'absolutely' possible to reduce the prison population in California safely and effectively." State App. 192a-193a (quoting intervenor expert). Intervenors do not claim this finding was error.

The court did not order the State to implement any particular population reduction measure; it gave the State the opportunity to design and submit a population reduction plan in the first instance. State App. 172a-175a. Nonetheless, the court conducted a detailed examination of the safe population-reduction measures that enjoyed near-universal support among the parties, and which the State has incorporated

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[7] Plaintiffs' experts, too, opined that the State can reduce its prison population without adversely impacting public safety. Trial Tr. 2012:20-25 (former Secretary of Corrections in Pennsylvania, Washington state and Maine); Trial Tr. 2106:8-2107:14 (member of State's expert panel); Krisberg Report at 4-12 (same); Austin 8/15/08 Report, Austin 8/27/08 Report, and Austin 9/25/08 Report (member of State's expert panel). Indeed, they demonstrated that dozens of jurisdictions throughout the country, including many within California, have reduced prison and jail populations without *any* resulting impact on crime rates. Trial Tr. 2103:20-2105:21; 2107:15-2108:17; 2108:19-2109:1, 2110:6-2111:8, 2111:10-21, 2112:17-20 (Dr. Krisberg). Moreover, this case is unusual in that most of plaintiffs' experts on the public safety issues are individuals previously hired by the state of California as leading correctional experts. Exh. P-2 at n (members of State's expert panel); Woodford Report (former acting Secretary of CDCR), State App. 55a.

into its population reduction plan. State App. 192a-220a; 11/12/09 State Plan (*Plata* Docket 2274-1).

A. The Three-Judge Court Correctly Found That There Are Numerous Means To Safely Reduce The Prison Population.

1. *Good Time Credits.* The three-judge court found that the State could safely reduce its prison population by providing additional "good time" credits to prisoners for conforming conduct and for participation in work programs and education programs. State App. 196a-204a. These types of credits have long been used as an "early release" mechanism in California and other jurisdictions, without adverse impact on public safety. State App. 196a.

Two separate State expert panels have already proposed reducing the prison population by expanding good time credits (Exh. P-2 at 12, Exh. E, 92-93 (expert panel report), State App. 55a; Exh. P-4 at 122, 130 (Deukmejian Report), State App. 54a), as did all independent experts who testified in this case, including experts for intervenors. Bennett Report ¶ 79; Bennett Supp. Report at 1; *see also* Cogbill Trial Decl. ¶ 12 (*Plata* Docket 1676) (Intervenor Sonoma County Sheriff-Coroner agreeing with Bennett); Trial Tr. 1015:21-1016:2 (Intervenor San Diego Deputy District Attorney: good time credits are "a better way" of reducing the prison population); Buddress Trial Decl. ¶ 5 (*Plata* Docket 1698) (Intervenor San Mateo County Chief Probation Officer supports early release as incentive for nonviolent behavior in prisons).

The three-judge court correctly found that expanding good time credits does not change prisoners' recidivism rates, and thus changing the date of release impacts the timing and circumstances of crime, but not the likelihood that it will occur. State App. 200a-204a. Intervenors' Jurisdictional Statement now contests this finding, Int. J.S. 17, but individual intervenors themselves readily conceded the fact during the proceedings below.[8]

All other public safety experts for both the State and plaintiffs also support the court's finding that granting more good time credits will not increase crime. *See* Trial Tr. 1995:21-24, 1997:8-18

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[8] *See, e.g.*, Trial Tr. 1154:4-8, 1154:18-1155:7 (Intervenor Stanislaus County Chief Probation Officer confirms that early release merely changes the time and circumstances of crime, but it would not change the statistical likelihood of crime taking place); Trial Tr. 3017:16-3019:18 (District Attorney Intervenors' closing argument); Trial Tr. 1826:7-1827:14 (Intervenor Los Angeles County Sheriff's Lieutenant); Buddress Trial Decl. ¶ 5 (*Plata* Docket 1698) (Intervenor San Mateo County Chief Probation Officer); *see also* Trial Tr. 2318:3-14 2319:1-23 (Intervenor City of Fresno Chief of Police); Amended Dyer Report ¶ 18 (*Plata* Docket No. 1937) (intervenor assumes no change in recidivism rate from increased good time credits); Munks Trial Decl. ¶ 4 (same); Trial Tr. 2452:5-2453:4 (Intervenor Director of Mental Health Department for Santa Clara) (same); Meyer Trial Decl. ¶¶ 29-30 (*Plata* Docket 1733) (same); 12/18/08 Stip. Regarding Testimony of Michael James ¶ 2(c) (*Plata* Docket 1967) (same); Bay Trial Decl. at 3 (*Plata* Docket 1698) (San Mateo County Director of Department of Housing) (same); Trial Tr. 2653:2-15 (Los Angeles County Sheriff's Department Chief of Correctional Services concedes that any threat from releasing prisoners, without having provided rehabilitative programs, exists regardless of whether prisoners are released early or late).

(defendants' public safety expert); Trial Tr. 1325:8-16, 1329:8-19 (former head of corrections in California); Krisberg Report at 5-11 (former member of expert panel who reviewed data from early release studies in nine U.S states, City of Philadelphia, and Canada and found that early released inmates had same or lower recidivism rates than other inmates); Trial Tr. 2102:2-2105:21 (Dr. Krisberg); Trial Tr. 1569:11-20 (Pennsylvania Secretary of Corrections).

Indeed, the court correctly found that because good time credits incentivize good behavior, awarding such credits will likely reduce recidivism. State App. 203a. State officials and other experts agree. *See, e.g.*, Trial Tr. 1724:6-21 (CDCR Undersecretary of Programs); Trial Tr. 1552:19-1554:3 (Pennsylvania corrections chief); Trial Tr. 1387:16-18.

2. *Diverting Technical Parole Violators.* The trial court also found that the State could safely reduce its prison population by diverting technical parole violators. State App. 209a, 204a-208a. Intervenors do not contest this finding.

Technical parole violators are individuals who have violated the terms of their parole, but have not been convicted of a new offense. State App. 204a-205a. "In California, more than 70,000 parolees are returned to prison each year for technical parole violations," State App. 204a, and those individuals spend an average of four months or less in prison (usually reception centers, where they receive no rehabilitative programs) before being returned to the community on parole. Trial Tr. 211:2-23; Trial Tr. 1316:7-1317:11; Austin 8/15/08 Report ¶ 55.

This system of revocation and return to prison is often referred to as "churning" of parolees, and it is

undisputed that such churning endangers public safety because it is destabilizing and breaks parolees' ties to the community, including their families, homes, jobs, and substance abuse programs. State App. 205a.

Diversion of technical parole violators is supported by many intervenors, and not opposed by others.[9] Moreover, diversion of a portion of the state's technical parole violators has long enjoyed the support of the Governor, key State prison officials, and the State's Expert Panel. Pls.' Exh. P-328 at 178 (Governor proposal), State App. 207a; Exh. P-2 at 47-49, Appx. A at 77-79, Appx. E at 88-89 (State's expert panel report), State App. 55a; Exh. P-113 at 75-91 (Governor's Strike Team Report), State App. 189a;

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[9] *See, e.g.*, Trial Tr. 3063:10-24 (San Mateo County Intervenors' closing argument); Buddress Trial Decl. ¶¶ 3-5, 12 (*Plata* Docket 1698) (Intervenor San Mateo County Chief Probation Officer) (support); Trial Tr. 1156:3-12 (Intervenor Stanislaus County Chief Probation Officer) (support); Amended Dalton Trial Decl. ¶ 33-35 (*Plata* Docket 1745) (Intervenor Los Angeles County Sheriffs' Department, Director of Bureau of Operations for Bureau of Offender Programs and Services) (proposing diversion of technical parole violators); Trial Tr. 2385:15-2386:7 (Intervenor Riverside County District Attorney) (may support diversion, depending on what alternative sanctions are proposed); Trial Tr. 2727:14-2728:5 (Intervenor Republican State legislator recommending reducing prison population through parole reform and stating he has introduced legislation to create intermediate sanctions for parole violations); Bennett Report ¶¶ 68-71 (Intervenor expert recommending reform of parole revocation policy including the use of a variety of sanctions); Bennett Supp. Report at 1 (supporting "the principal incarceration and supervision reforms advanced by Plaintiffs").

Exh. P-3 at 31 (California Little Hoover Commission), State App. 53a; Exh. P-4 at 122, 144-155 (Deukmejian Report), State App. 54a; Hoffman Trial Aff. ¶¶ 18-25 (*Plata* Docket 1633) (State parole chief); Exh. D-1306; Trial Tr. 1993:6-14 (State's public safety expert).

Current and former heads of four state correctional systems also agree that California should reduce its prison population by diverting technical parole violators. Woodford Supp. Report ¶¶ 31-32 (former head of corrections in California); Lehman Report ¶¶ 12-13 (former head of corrections in Pennsylvania, Maine and Washington); Trial Tr. 1571:6-1572:15 (current head of Pennsylvania corrections).

3. *Diverting Low Risk Offenders With Little Time to Serve.* The three-judge court further found that the prison population could be safely reduced by diverting certain low-risk offenders from prison. State App. 210a-214a. Intervenors do not contest the finding that such a program could be implemented without adversely impacting public safety.

Indeed, some intervenors, and intervenors' independent expert, themselves recommend that the state consider "broadening the target range for prison diversion under state sentencing guidelines." Bennett Report ¶ 79.[10]

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[10] *See also* Bennett Supp. Report at 1 (supporting "the principal incarceration and supervision reforms advanced by Plaintiffs"); Trial Tr. 3044:7-8, 3045:5-12 (Law Enforcement Intervenors' closing argument); Cogbill Trial Decl. ¶ 12 (*Plata* Docket 1676) (Intervenor Sonoma County Sheriff supports

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Similarly, the State has long supported such diversion plans as a safe means to reduce the prison population. *See, e.g.*, Exh. P-780 at 18 (Governor's proposal to convert crimes to misdemeanors, so offenders do not go to prison), State App. 197a. This proposal is in line with the testimony of the State's experts. Trial Tr. 1087:4-22 (State expert recommends diversion as a "very reasonable strategy"). One former head of California prisons also affirmed that it would be appropriate to divert some low-risk prisoners because "California incarcerates many more prisoners than is necessary for the safety of the public" and intermediate sanctions are appropriate for some offenders. Woodford Supp. Report ¶ 32.

4. *Expanded Rehabilitation Programs.* Finally, the three-judge court found that expanding rehabilitative programs, particularly within communities, would reduce the prison population without adversely affecting public safety. State App. 214a-216a.

This population reduction method is overwhelmingly supported by intervenors.[11]

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reforms recommended by Bennett); Trial Tr. 2368:9-2369:12 (intervenor recommends population reduction through diversion, and arguing that if done right it could improve public safety); Dumanis Trial Decl. ¶¶ 18-20 (*Plata* Docket 1711) (Intervenor San Diego District Attorney, President of the California District Attorneys Association); James Trial Decl. ¶ 20 (*Plata* Docket 1728) (Intervenor Orange County Assistant Sheriff).

[11] *See, e.g.*, Exh. D-1329 at 103-104 (testimony of Intervenor Chief Probation Officer of San Mateo County); Trial Tr. 990:17-

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The Chief Probation Officer of Stanislaus County and the president of the Chief Probation Officers of California testified that providing rehabilitative programs to probationers in local communities would reduce the prison population by 20,000 to 25,000 prisoners. Powers Report at 6.

B. Intervenors' Complaints About The Three Judge Court's Methodology And Findings Are Misplaced.

1. Intervenors find it "inexplicabl[e]" that the court did not order the State to implement the measures (such as rehabilitative programs, or use of a risk assessment instrument) that it had found to be safe. Int. J.S. 15. Yet intervenors do not address – much less contest – the three-judge court's conclusion that it must defer to the State's proposed population reduction measures, consistent with this Court's decisions in *Bounds v. Smith*, 430 U.S. 817, 832-833 (1977) and *Lewis v. Casey*, 518 U.S. 343, 361-363 (1996). State App. 172a-173a. Intervenors fail to

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995:3 (representative of Intervenor San Diego County Deputy District Attorney); Rodriguez Trial Decl. ¶ 21 (*Plata* Docket 1713) (representative of Intervenor San Diego District Attorney); Conklin Trial Decl. ¶¶ 17-24 (*Plata* Docket 1659) (witness for Intervenor San Diego County Sheriffs Department); Trial Tr. 1159:14-1160:17, 1162:18-1163:6 (Intervenor Stanislaus County Chief Probation Officer); Buddress Trial Decl. ¶¶ 3, 8, 10, 11, 13 (*Plata* Docket 1698) (Intervenor San Mateo County Chief Probation Officer); Bennett Report ¶ 59-71 (expert for Intervenor Sonoma county); Trial Tr. 2325:9-12 (Intervenor Fresno Police Chief); Trial Tr. 2383:17-2384:14 (Intervenor Riverside County District Attorney); Trial Tr. 2652:14-16 (Intervenor Los Angeles County Sherriff's Department Chief of Correctional Services).

present any argument to support a different approach.[12]

Intervenors next contend, incongruously, that the three-judge court "admits, as it must, that its order cannot be implemented without compromising public safety." Int. J.S. 15. The three-judge court, however, said just the opposite: that means exist by which the state can reduce its prison population without compromising public safety. State App. 187a-188a. The excerpt that intervenors cite is merely a footnote stating that there is insufficient space inside the prisons for in-prison rehabilitative programming. State App. 215a n.80. But the lack of sufficient space for such programs inside prison says nothing of the ability to safely award good time credits, safely divert certain parolees and low-risk prisoners, and safely provide programming in the communities, and it does not alter the court's ultimate conclusion.

2. Intervenors complain that the court erred when it "disregarded" opinions of certain intervenor witnesses that the court found to be not credible. Int. J.S. 16. This Court has long cautioned that findings "based on determinations regarding the credibility of witnesses" demand great deference. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). Indeed, where a trial court's credibility determination "is based on [its] decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not

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[12] In any event, the court has yet to issue a final "prisoner release order," and it is still unclear whether intervenors' preferred programs will be implemented by the State.

contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Id.* Intervenors offer no argument to justify disturbing this rule of deference.

In any event, the findings that intervenors contest are well supported. The three-judge court properly considered warnings issued by witnesses who "objected to simply throwing open the prison doors and releasing inmates in a generic manner;" as the court correctly found, those warnings were unfounded because such a remedy would not be "contemplated or ordered by the court." State App. 193a-194a; *see also* State App. 220a-222a, 233a-234a, 246a-248a. And indeed, the State's population reduction plan contemplates a gradual reduction of the prison population using well-accepted, safe methods.

Intervenors claim hyperbolically that by failing to heed their warnings the three-judge court has "virtually assure[d] that . . . crime will spike in California as a result of the Prisoner Release Order." Int. J.S. 17. There is no support in the record for such a claim. There is, however, ample support in the record for the opposite conclusion. Dozens of jurisdictions throughout California and the nation have implemented prison population reductions; none have experienced an increase in recidivism or crime. Trial Tr. 2103:20-2105:5-21; 2107:15-2108:17; 2108:19-2109:1, 2110:6-2111:8, 2111:10-21, 2112:17-20 (Dr. Krisberg).

Similarly, historical data shows that there is no relationship between the crime rate and the incarceration rate. Austin 8/15/08 Report ¶¶ 19-26; Trial Tr. 2160:20-2162:7 (Dr. Krisberg); *see also* Exh.

P-842, Trial Tr. 2815, 2842 (historical data in California establishes that there has been no relationship between increasing numbers of parolees in the community and crime rates).

Intervenors' contention that the three-judge court erred by "disregarding" their evidence on public safety is further undermined by the gross distortions in their own witnesses' testimony. A chief complaint expressed by intervenors at trial was that any reduction in the prison population would adversely impact their county criminal justice systems; but intervenors were forced to concede that their fears were overstated. For example, one Sheriff intervenor declared that a reduction in the prison population would cause his crowded jail to overflow, and that it would cost millions of dollars to transfer hundreds of jail inmates to other county jails; but he later admitted that his methodology for reaching those figures was flawed. Trial Tr. 1794:19-22. In fact, his jail is not overcrowded – it is running well below capacity, Trial Tr. 1791:6-12, and no jail inmates would need to be sent out of county, because the number of new arrests from parolees would not even fill the current facility.

Another intervenor similarly testified that a prison population reduction would overwhelm his jail system, but he was forced to admit at trial that the county jails are well below capacity (Trial Tr. 2272:1-6 (Graves); Exh. P-841, Trial Tr. 2272-73), and that the county has closed down some jail beds and rented other jail beds to nearby counties (Trial Tr. 2276:5-18).

Still another intervenor testified that a reduction in the prison population would result in an increase

in the average daily population of his county jail (Christianson Trial Decl. ¶¶ 23, 26 (*Plata* Docket 1727)), but then admitted that he had no idea how he reached the conclusion about the increase in the jail population – his staff came up with the number via a methodology he did not understand. Trial Tr. 2677:7-2680:7; *see also* James Trial Decl. ¶ 33 (*Plata* Docket 1728) (Intervenor Orange County Assistant Sheriff) (similar exaggeration).

Yet another intervenor admitted that her estimate of the cost to the county from a prison population reduction were wildly overblown, in one instance by a factor of more than twenty. Stip. Regarding Testimony of Beverly Beasley Johnson ¶¶ 6-8 (*Plata* Docket 1922); *see also* Trial Tr. 1819:15-1830:3, 1830:21-1831:23 (Intervenor Los Angeles County Sherriff's Lieutenant Stephen Smith exaggerating the impact on LA county jails); Pacheco Trial Decl. ¶¶ 18, 21-22 (*Plata* Docket 1706) (Intervenor Riverside County District Attorney exaggerating the impact of a prison population reduction by assuming that the State would return parolees to the county all at once, not gradually over a 2-year period); Ryan Trial Decl. ¶¶ 26-27 (*Plata* Docket 1726); Trial Tr. 2706:21-2707:5 (Intervenor Amador County Sheriff exaggerating the impact of a population reduction on prosecutors' ability to try cases). These are but a sampling of the myriad inaccuracies and exaggerations marring Intervenors' trial testimony.

The three-judge district court carefully reviewed the testimony and evidence presented by intervenors, State defendants, and plaintiffs, and correctly concluded that the evidence "overwhelmingly showed

that there are ways for California to reduce its prison population without [] an adverse impact, and that a less crowded prison system would in fact benefit public safety and the proper operation of the criminal justice system." State App. 248a-249a. Intervenors fail to demonstrate any error.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in appellees' Motion to Dismiss or Affirm in Case No. 09-416, the appeal should be dismissed or the order below should be affirmed.

Respectfully submitted,

Michael Bien
Jane E. Kahn
Ernest Galvan
Amy Whelan
Lisa Ells
ROSEN, BIEN & GALVAN, LLP
315 Montgomery St., 10th Fl.
San Francisco, CA 94104

Donald Specter
Counsel of Record
Steve Fama
Alison Hardy
Sara Norman
Rebekah Evenson
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, CA 94710
(510) 280-2621

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